

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA, Upon
the Relation of J. L. FINCH,
Appellant,

vs.

H. S. ELLIOTT, a United States Commissioner for
the Western District of Washington,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

FILED

JAN 14 1925

FILMER BROS. CO. PRINTING

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Western District of
Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon
the Relation of J. L. FINCH,
Relator,

vs.

H. S. ELLIOTT, a United States Commissioner
for the Western District of Washington,
Respondent.

AMENDED PETITION FOR A WRIT OF
CERTIORARI.

To the Honorable JEREMIAH NETERER, Judge
of said Court:

Comes now your relator, J. L. Finch, and peti-
tions and says, to wit:

*Page-number appearing at foot of page of original certified Tran-
script of Record.

That the respondent H. S. Elliott is now and was during all the times herein mentioned a United States Commissioner for the Western District of the State of Washington; on the 21st day of November, 1924, Earl Corwin, claiming to be and acting as a Federal Prohibition Agent of the state of Washington, appeared before said respondent and made complaint against your relator and others charging a crime was being committed against the United States in violation of the National Prohibition Act and praying that a warrant issue by said respondent for the search of the offices of affiant in Room 1026 in the L. C. Smith Building in the city of Seattle, State of Washington, and of the furniture, safes, receptacles, cabinets, desks and equipment of such offices, and that thereupon, the respondent, exercising judicial functions, but acting wholly in excess of and without his jurisdiction in the premises issued a warrant for the search of the said offices of this affiant, a copy of which said warrant is hereto attached, made a part hereof and to which reference is hereby made for greater particularity of description; your relator says and alleges, that prior to the issuance of said warrant no showing of [2] probable cause, supported by oath or affidavit as required by law was made or shown to respondent, nor were any facts set forth or shown tending to establish the grounds of the application or probable cause for believing that such grounds existed; or any showing made except by affidavits of which Exhibits "A" and "B" attached, are copies. Under and by virtue of the color of

authority conferred upon them by such warrant J. W. Simmons, Walter Justi, W. J. Griffeth and Earl Corwin, claiming to be officers of the United States and empowered to execute said warrant entered the offices of your relator on the 21st day of November, 1924, at Rooms 1025 and 1026 in the L. C. Smith Building, City of Seattle, State of Washington, and against the protests of relator made search of his office and of the safe, desks, furnitures, files, papers and equipment of said office, and took and carried away therefrom certain papers and files which they believed would be of value to them; your relator is now and for more than 20 years last past has been an attorney at law and engaged in the practice of his profession, and the offices aforementioned are the offices he maintains for the practice of his profession, and wherein he has kept valuable memoranda, papers, files, letters, receipts, bills and other papers of importance, some of which belong to him personally, some of which belong to his clients and have been entrusted to his care as an attorney, and others of which are memoranda and papers having to do with his professional matters, and all of which are of more or less confidential nature and of great value to him personally and in the practice of his profession, and many of which are necessary for him in the preparation and conduct of cases now pending in court, or about to be commenced therein; no liquors intoxicating or otherwise were found in his office, nor has any liquor ever been kept in his said office for sale in [3] violation of law or otherwise, and the entire pro-

ceedings brought and now pending before said respondent was brought and is being prosecuted, as affiant verily believes, for no other purpose or intent than to bring about an unlawful and wholly unwarranted search of the office of your relator to obtain papers, memoranda, letters, files and things which might be used by those making such search in the preparation of cases now pending or about to be commenced, and was wholly without any lawful or just purpose and intent, was false, oppressive, concocted in deceit, a subterfuge to gain unlawful advantage and a clear abuse of the process under which such action was taken; a memoranda of the papers and things taken from the office of your relator under such warrant is attached hereto, marked for identification and hereby made a part of this petition. Your relator alleges that if said papers are not impounded under process of this court those who hold the same under such warrant will make unlawful use thereof and of the contents thereof, to the great and irreparable harm of this relator. That your relator is without any plain, speedy or adequate remedy in the ordinary course of law and there is no appeal, and your relator says further in this regard, that it has been the practice in all matters of similar nature prosecuted before said respondent for the respondent to be guided wholly by the desires and request of the officers of the Prohibition Department and to defer in all things to such desires of such officers, regardless of the legal rules and practice provided by law for proceedings of such nature; that returns

to such search-warrants are not made as required by law but that the officers making such searches unlawfully withhold their returns to such warrants for unreasonable and wholly unjustified periods of time, and that your relator has reason to believe and does believe that in the instant matter no return will be made [4] to such warrant within the time prescribed by law, or within any time within reason; that no hearing of a motion to quash said warrant, or of the facts or bases for the issuance of such warrant if controverted before said respondent, could or would be heard before said respondent within such period of time as would prevent irreparable injury to your relator being done.

Wherefore your relator prays, that a writ issue to the end and purpose that a review of all proceedings had before said respondent in the premises be made, and that a time and place be fixed in said writ for the return of all such proceedings to this court and for a hearing thereon, and that on such hearing such relief be granted as to this court may seem meet and proper in the premises. And your relator further prays that said writ direct and order that pending a hearing on such return all proceedings before the respondent upon such matter be stayed, and further direct that all papers, books, files, letters, receipts, memoranda, and other things taken and seized under such search-warrant be forthwith delivered up to the Marshal or Clerk of this Court or such other custodian as may be named in said writ so to be im-

pounded until final order be made herein, and further order and restrain that until such final determination be made in the premises, all officers, agents and persons whomsoever into whose hands the said papers, files, memoranda and other things so taken and seized under such warrant have come desist and refrain from disclosing or in anywise making use of any knowledge, information or thing learned from any examination thereof by them made. And that your relator may have such other and further relief as may seem meet and proper in the premises according to equity.

J. L. FINCH,

Attorney in Propria Persona,
1026 L. C. Smith Building,
Seattle, Washington. [5]

State of Washington,
County of King,—ss.

J. L. Finch, being first duly sworn on oath deposes and says that he is the relator named in the foregoing petition; that he has read the foregoing petition, knows the contents thereof and that the matters and things therein alleged are true.

J. L. FINCH.

Subscribed and sworn to before me this 25 day of November, 1924.

[Seal]

MARY L. WHITE,
Notary Public for the State of Washington Residing at Seattle.

The foregoing petition having been this day presented and considered IT IS ORDERED that a

writ issue under the seal of this court directed to the respondent, H. S. Elliott, a United States Commissioner, for the Western District of Washington, directing and requiring that the respondent make return to this Court as provided by law on or before the — day of —, 1924, at the opening of court on said day of all proceedings had, done and taken by and before him in the matter of a certain search-warrant issued by him on the 21st day of November, 1924, under seal on complaint of Earl Corwin against Jerry Finch and others wherein was directed to be made a search of the premises known and described therein as 1026 L. C. Smith Building, Seattle, Washington, and that hearing on such return be had on the — day of —, 1924, and that pending final determination of such matter by this Court all further proceedings therein before such respondent be stayed; that all persons whomsoever to who knowledge of the issuance of said writ may come and in particular all persons having in their hands the said search-warrant or anything of whatsoever nature seized, taken or held thereunder, [6] forthwith surrender the same to — to be kept and impounded until further order of this Court herein, and further that any and all persons into whose hands the said things so taken under said warrant may have come or who have gained or received knowledge of the contents of the papers and other things taken under such warrant, since the same were taken thereunder, be

restrained and they will be restrained from using, disclosing, communicating, or permitting the use, disclosure or communication of any matter or thing learned, or which might or could have been learned from an examination of the papers and other things so taken under said search-warrant.

Dated this — day of November, 1924.

Judge. [7]

EXHIBIT "A."

United States of America, Western District of
Washington, Northern Division.

APPLICATION AND AFFIDAVIT FOR SEARCH-WARRANT.

Earl Corwin, being first duly sworn, on his oath, deposes and says:

That he is a Federal Prohibition Agent duly appointed and authorized to act as such within the said District; that a crime against the Government of the United States in violation of the National Prohibition Act of Congress was and is being committed, in this, that in the City of Seattle, County of King, State of Washington, and within the said District of Washington, and Division above named, one Jerry Finch, Roy Olmstead, Dick Elbro, Herb Fletcher, Ed. McInnis, W. J. Symonds, C. S. Green, proprietors and their employees on the 17th day of November, 1924, and thereafter was, and is, possessing, and selling intoxicating liquor, all for beverage purposes; and that in addition thereto

affiant states that said premises are not a *dwell-* nor a private residence, and that affiant has heard each of said above persons state that said premises were their office and that affiant submits the attached affidavit and incorporates the same herein; all on the premises described as Room 1026 L. C. Smith Building and connecting rooms, Seattle Washington, including all furniture, safes, receptacles, cabinets, desks and equipment and on the premises used, operated and occupied in connection therewith and under control and occupancy of said above parties; all being in the County of King, State of Washington and in said District; ALL in violation of the Statute in such cases made and provided and against the peace and dignity of the United States of America.

WHEREFORE, the said affiant hereby asks that a search-warrant be issued directed to the United States Marshal for the said District, and his deputies, and to any Federal Prohibition [8] officer of Agent, or deputy in the State of Washington, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents or inspectors, directing and authorizing a search of the person of the said above-named persons, and the premises above described, and seizure of any and all of the above described property and intoxicating liquor, materials, containers, papers and means of committing the crime aforesaid, all as provided by law and said Act.

EARL CORWIN.

Subscribed and sworn to before me this 21st day of November, 1924.

H. S. ELLIOTT,
United States Commissioner, Western District of
Washington.

EXHIBIT "B."

United States of America,
Western District of Washington,
Northern Division,—ss.

SUPPORTING AFFIDAVIT.

Earl Corwin, being first duly sworn, on his oath, deposes and says:

That on the 12th day of July, 1924, in the City of Seattle, County of King, State of Washington affiant heard Jerry Finch state that he had intoxicating liquor in said premises at 1026 L. C. Smith Building, Seattle, Washington, and has heard said Finch make the same statement on one or more times each month in August and September, 1924, and has heard said Finch order intoxicating liquor very recently to be sent to said premises and has heard said Finch and Olmstead, Fletcher arrange at said premises for the traffic of intoxicating liquor and said parties state that the books and documents relating to the said intoxicating liquor were in said premises and that some of said conversations were held within less than thirty days last past, and that affiant has heard some of the above parties make arrangements with reputed bootleggers to meet and transact [9] business in said

above premises relating to the sale, transportation and possession of intoxicating liquor.

EARL CORWIN. (Signature)

Subscribed and sworn to before me this 21st day of November, 1924.

H. S. ELLIOTT,
United States Commissioner, Western District of
Wash. [10]

SEARCH-WARRANT.

Local Form No. 103.

United States of America,
Western District of Washington,
Northern Division,—ss.

The President of the United States to the Marshal of the United States for the Western District of Washington, and His Deputies, or Either of Them, and to any Federal Prohibition Officer or Agent, or the Federal Prohibition Director of the State of Washington, or Any Federal Prohibition Agent of Said State, and to the United States Commissioner of Internal Revenue, His Assistants, Deputies, Agents, or Inspectors, GREETING:

WHEREAS, EARL CORWIN, a Federal Prohibition Agent of the State of Washington, has this day made application for a search-warrant and made oath in writing, supported by affidavits, before the undersigned, a Commissioner of the United States for the Western District of Washington, charging that a crime is being committed against

the United States in violation of the NATIONAL PROHIBITION ACT of Congress by one JERRY FINCH, ROY OLMSTEAD, DICK ELBRO, HERB FLETCHER, ED McINNIS, W. J. SYMONDS, C. S. GREEN, proprietors and their employees who was, on the 17th day of November, 1924, and is at said time and place, possessing, and selling intoxicating liquor, all for beverage purposes, on certain premises in the City of Seattle, County of King, State of Washington, and in said District, more fully described as Room 1026 L. C. Smith Building and connecting rooms, Seattle, Washington, including all furniture, safes, receptacles, cabinets, desks and equipment and on the premises used, operated and occupied in connection therewith and under the control and jurisdiction of said above parties:

AND WHEREAS, the undersigned is satisfied of the existence of the grounds of the said application, and that there is probable cause to believe their existence.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, and authorized and [11] *and* empowered in the name of the PRESIDENT OF THE UNITED STATES to enter said premises with such proper assistance as may be necessary in the daytime, or night-time, and then and there diligently investigate and search the same and into and concerning said crime, and to search the person of said above named persons, and from him or her, or from said premises seize any and all of the property, documents, papers and materials so

used in or about the commission of said crime; and any and all intoxicating liquor and the containers thereof, and then and there take the same into your possession, and true report make of your said acts as provided by law.

GIVEN under my hand and seal this 21st day of November, 1924.

[Comm. Seal]

H. S. ELLIOTT,

United States Commissioner, Western District of Wash. [12]

November 21, 1924.

RECEIVED OF J. L. Finch the following papers:

Receipt from First Nat. Bank of Snohomish for \$60. Dated Sept. 26.

Copy of Letter, Burns Poe, July 2.

Letter from Poe Dated July 1.

Receipt for payment of Income Tax, No. 301300.

Dup. Income Tax Report.

Copy of letter from Ralph Viele et ux, Dated May 20.

Abstract of Title No. 110795.

Copy of Letter to Dow, Re "Elsie," July 17, 1924.

Receipt of Co. Auditor Oct. 28, '24, Covering instruments 1934246 & 1934247.

Copy of letter with Receipt attached, First Nat. Bank of Snohomish, Dated Sept. 25.

File No. 112.

Same taken under Search-warrant Dated Nov. 21, 1924, from H. S. Elliott.

EARL CORWIN,
Federal Prohibition Agent.

TAKEN FROM ROLL-TOP DESK :

- 1 envelope containing water bill from City Water Dept. to Phillip G. Kinzer, dated May 29, 1924.
- 1 Memorandum marked Exhibit "L" by Mr. Finch.
- Letter from Wilbur E. Dow to Mr. J. L. Finch, dated Nov. 19, 1924.
- 1 Warranty deed from Phillip G. Kinzer & Claranelle N. Kinzer, dated Sept. 28, 1923.
- 1 Quitclaim Deed from Roy Olmstead to Elise Olmstead, Dated Nov. 17, 1924.

TAKEN FROM DRAWER 4-K-B-14:

- 1 Memorandum marked by J. L. Finch as Exhibit "H."
- 1 Memorandum marked by J. L. Finch as Exhibit "I."
- 1 Water dept. receipt for 3757 Ridgeway Pl. Marked by J. L. Finch as Exhibit "J."

The above list of papers taken by me this day by virtue of Search-Warrant dated Nov. 21, 1924, from H. S. Elliott.

Nov. 21, 1924.

EARL CORWIN,
Federal Prohibition Agent. [13]

DRAWER 4-K-B-14:

- 1 Bill to P. L. Graignic dated June 2d, 1924.
- 1 Roll of bills to P. L. Graignic, 1st date being May 17, 1924.
- 1 Bdl. bills to P. L. Graignic 1st bill being dated May 10, 1924.

- 1 List marked by J. L. Finch as Exhibit "A."
- 1 list marked by J. L. Finch as Exhibit "B."
- 1 memorandum marked by J. L. Finch as Exhibit "C."
- 1 Memorandum marked by J. L. Finch as Exhibit "D."
- 1 Memorandum Marked by J. L. Finch as Exhibit "E."
- 1 Memorandum marked by J. L. Finch as Exhibit "F."
- 1 Memorandum Marked by J. L. Finch as Exhibit "G."

TAKEN FROM DRAWER 4-K-B-18:

- 1 envelope containing papers marked by J. L. Finch as Exhibit "K."
- 1 Bill of Sale Eckman to Hubbard.

TAKEN FROM LARGE MIDDLE DRAWER:

- 1 Quitclaim deed Sallie Olmstead to Elise Olmstead.
- 1 Quitclaim deed Michael Donovan to Elise Olmstead.

The above list of papers taken by me this day by virtue of Search-warrant dated Nov. 21, 1924, from H. S. Elliott.

EARL CORWIN,
Federal Prohibition Agent.

TAKEN FROM RECEIPT FILE ON TOP OF SAFE:

Telephone bills for months of May, June, July, and Sept. 1924.

The above list of papers taken by me this day by

virtue of Search-warrant dated Nov. 21, 1924, from
H. S. Elliott.

Nov. 21, 1924.

EARL CORWIN,
Federal Prohibition Agent.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Nov. 25, 1924. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [14]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon
the Relation of J. L. FINCH,

Relator,

vs.

H. S. ELLIOTT, a United States Commissioner
for the Western District of Washington,
Respondent.

DECISION.

(On Petition of J. L. Finch.)

Filed Dec. 11, 1924.

The relator prays:

“ * * that a writ issue to the end and pur-
pose that a review of proceedings had before
said respondent in the premises be made
* * ; that pending the hearing on such re-

turn all proceedings before the respondent upon such matter be stayed, and further direct that all papers, books, files, letters, receipts, memoranda, and other things taken and seized under such search-warrant, be forthwith delivered up to the Marshal or Clerk of this court or such other custodian as may be named in said writ, so to be impounded until final order be made herein * * ; that until such final determination be made in the premises all officers, agents and persons whomsoever into whose hands the said papers, files, memoranda and other things so taken and seized under such search-warrant have come, desist and refrain from disclosing or in anywise making use of any knowledge, information, or thing learned from any examination thereof by them made. * * ”

The amended petition states in substance:

“That the respondent H. S. Elliott is now and was during all the times herein mentioned a United States Commissioner for the Western District of the State of Washington; on the 21st day of November, 1924, Earl Corwin, claiming to be and acting as a Federal Prohibition Agent of the State of Washington, appeared before said respondent and made complaint against the relator and others, charging a crime was being committed against the United States in violation of the National Prohibition Act and praying that a warrant issue by said respondent for the search of the offices of affi-

ant in Room 1026 in the L. C. Smith Building
* * and of the furniture, safes, receptacles,
cabinets, desks and equipment of such offices
* * ; that prior to the issuance of such war-
rant no showing of probable [15] cause
* * was made or shown * * , nor were
any facts set forth or shown tending to estab-
lish the grounds of the application or probable
cause * * . Under and by virtue of the
color of authority conferred upon them by such
warrant J. W. Simmons (and others named),
claiming to be officers of the United States em-
powered to execute said warrant entered the
office of the relator * * and against the pro-
test of relator made search * * and took
and carried away therefrom certain papers and
files * * , some of which belong to him per-
sonally, some of which belong to his clients and
have been entrusted to his care as an attorney
* * all of which are of more or less confiden-
tial nature and of great value to him person-
ally and in the practice of his profession, and
many of which are necessary for him in the
preparation and conduct of cases now pending
in court, or about to be commenced therein;
* * no liquors, intoxicating or otherwise,
were found in his office * * ; that your re-
lator is without any plain, speedy or adequate
remedy in the ordinary course of law, and
there is no appeal * * ; that your relator
has reason to believe and does believe that in
the instant matter no return will be made to

such warrant within the time prescribed by law, or within any time within reason; that no hearing of a motion to quash said warrant, or of the facts or bases for the issuance of such warrant if controverted before said respondent, could or would be heard before said respondent within such period of time as would prevent irreparable injury to your relator being done.”

Upon the filing of the amended petition the Court set the matter for hearing, at which time the relator appeared in his own behalf and the respondent represented by the United States Attorney.

It is contended by the relator that this is an original proceeding to stay and supersede the proceedings before the Commissioner. Respondent contends by special appearance that the court is without jurisdiction by Section 10496b C. S., and that the District Judge and Judges of state courts of record, and United States commissioners, have the same power to issue search-warrants, and that this Court is without power to review the action of the Commissioner, who has equal powers under this section, and that the Court has no inherent power to review the acts of a ministerial officer of the government, the Commissioner being a ministerial officer of the court and having no judicial power, and that issuance of a search-warrant is not a judicial function.

J. L. FINCH, Esq., Relator, of Seattle, Wash., *in propria persona.*

C. T. McKINNEY, Esq., Asst. U. S. Attorney, of Seattle, Wash., Attorney for Respondent.

JEREMIAH NETERER, District Judge:

The relator invokes the original jurisdiction and "prays a writ of certiorari," an order of injunction against persons not parties to this action, and the impounding of papers, etc., seized under a search-warrant [16] issued by the respondent, "a United States Commissioner," and alleged to be in possession of the parties who executed the warrant.

Certiorari is a writ having several purposes; one to enable a Court of reviewing power to examine the action of an inferior court; another is to enable the Court to get further information in an action then pending before it for adjudication. *L. M. A. & C. R. Co. vs. L. T. Co.*, 78 Fed. 659. It is a proceeding appellate in the sense that it involves a limited review of the proceedings of an inferior jurisdiction,—*Basanat vs. City of Jacksonville*, 18 Fla. 529; and lies only to inferior courts and officers exercising judicial powers, and is directed to the Court, magistrate, or board exercising such powers, requiring the certification of the record in a matter already terminated. *People vs. Walter*, 68 N. Y. 403; *People vs. Livingston County*, 43 Barb. 232. Its function is not to restrain or prohibit, but to annul. *Gault vs. City and County of S. F.*, 122 Cal. 18 (54 Pac. 272). It is a revisory remedy for the correction of errors of law apparent upon the rec-

ord, and will not lie where there is another remedy except for want of jurisdiction. Farmington River & Waterpower Co. vs. Co. Commrs., 112 Mass. 206; La Mar vs. Co. Commrs. etc., 21 Ala. 772; Thompson vs. Reed, 29 Iowa, 117; Memphis & C. R. Co. vs. Brannum, 11 So. 468 (96 Ala.); McAloon vs. License Commrs. etc., 46 Atl. 1047; Saunders vs. Sioux City Nursery Co., 24 Pac. 532 (6 Utah). The scope of the writ has been enlarged so as to serve the office of a writ of error. Degge vs. Hitchcock, 229 U. S. 162. If this Court has power to issue the writ sought, it obviously could not, in this, an original proceeding against the respondent, "a United States Commissioner * * ," enjoin strangers to this action,—U. S. vs. Maresca, 266 Fed. 713,—or require parties not before the Court even though the warrant was issued to, and executed by them, to surrender and deliver up property taken, nor direct an officer of this court to pursue such parties and take from their possession documents, evidentiary or otherwise, which may have been wrongfully taken.

The Court, no doubt, has power to supervise the conduct of its officers,—Griffin vs. Thompson, 43 U. S. 241,—and a United States Commissioner, while not strictly an officer of the court, may to a degree be subject to its supervisory control. U. S. vs. Allred, 155 U. S. 591. His powers grew from authority to take oaths and acknowledgments to that of an examining and committing magistrate,—Sec. 1014, Rev. Stats.; U. S. vs. Devers, 125 Fed. 778; Todd vs. U. S., 158 U. S. 278,—and while so

acting, discharged judicial functions and had "no divided responsibility with any other officer of the government," U. S. vs. Schuman, #16237 Fed. Cases; U. S. vs. Devers, *supra*. He performed quasi-judicial functions and possessed such powers as were especially conferred. U. S. vs. Tom Wah, 160 Fed. 207. He has no power to punish for contempt. *Ex parte Perkins*, 29 Fed. 900; *In re Perkins*, 100 Fed. 950 at 954. The Espionage Act confers special powers in providing for the issuance of search-warrants and prescribes the procedure with relation thereto.

Sec. 10496 $\frac{1}{4}$ a, Comp. Stats.—"A search-warrant * * may be * * issued by a judge of the United States District Court or * * by a United States Commissioner * * ."

Sec. 10496 $\frac{1}{4}$ e: "It cannot be issued but upon probable cause, supported by affidavit * * ."

Sec. 10496 $\frac{1}{4}$ f: "If the * * commissioner is satisfied of the existence of grounds * * he must issue a search-warrant * * [17] stating the probable cause * * ."

Section 10496 $\frac{1}{4}$ k: "A search-warrant must be executed and returned to the * * Commissioner who issued it within ten days * * ; after * * this time * * unless executed (it) is void."

Section 10496 $\frac{1}{4}$ o: "If the grounds * * be controverted * * the Commissioner must proceed to take testimony * * ."

Section 10496 $\frac{1}{4}$ p: "If it appears that the property or paper taken is not the same as that

prescribed in the warrant or that there was no probable cause * * the * * commissioner must cause it to be restored to the person from whom taken * * .”

Section 10496¹/₄q: “The * * commissioner must annex the affidavits, search-warrant, return, inventory and evidence * * and * * at once file the same, together with a copy of the record of his proceedings, with the Clerk of the court * * .”

It is obvious that a complete procedure is provided. No supervisory power or appellate jurisdiction is given to the District Judge. If the Court may review, it must be because of inherent power. The power of the commissioner of the issuance of a search-warrant is equal to that of the District Judge. The power of each emanates from a common source. The Congress has the power “to constitute tribunals inferior to the Supreme Court.” U. S. Constitution, Art. 1, Sec. 8, Clause 9; Art. 3, Sec. 1. The power to create implies the power to limit the jurisdiction. U. S. vs. Hudson, 11 U. S. 32 (7 Cranch). The Federal court is of limited jurisdiction, and has no power except such as is expressly granted or necessarily implied. *Turner vs. Bank of N. A.*, 4 Dell. 9. Within this limitation it is a court of general jurisdiction. *Toledo S. L. & W. R. Co. vs. Peruchie*, 205 Fed. 472. The District Courts have power to issue writs not especially provided for by statute which may be necessary for the exercise of their respective jurisdictions

and agreeable to the usages and principals of law. Comp. Stats., sec. 1239. Rev. Stats. sec. 716.

Can a District Judge, without statutory authority "agreeable to the usages and principals of law" by *certiorari* review "a search-warrant" proceeding of a United States Commissioner, who is given equal power by the Congress? If so, can one District Judge review the act of another District Judge in like manner? It is plain, however, that the Commissioner proceedings have not been concluded and that the relator has not exhausted his remedy before the Commissioner.

The office and history of a United States Commissioner is clearly given by Judge Hough in *U. S. vs. Maresca, supra*. While the Court has the right to issue the writ,—In *Re Chetwood*, 165 U. S. at 462, Judge Hough in *U. S. vs. Maresca*, [18] *supra*, said:

"It does not follow that a *certiorari* must issue, and as against a magistrate exercising only arresting and committing powers it ought not to issue, and unless imposed by statute cannot issue under customary law, as is well and I think conclusively shown by Hagie, J., in *Farrow vs. Springer*, 57 N. J. Law, 553 (31 Atl. 215).

There is no statutory imposition of that remedy by Congress, and therefore, in my opinion, it does not exist in this matter."

He also held that a United States Commissioner, under the present law, in issuing a search-warrant exercised the powers of the District Court

(10496¹/₄a, *supra*), and while so acting, "was sitting in the District Court" and the law seems to so read. He also said at page 723:

"The view that this entire matter of issuing a search-warrant and then directing the return of what was seized thereunder is a district court's proceeding, is confirmed by study of the nature and history of the case reported as *Veeder vs. United States*, 252 Fed. 414" (*certiorari* refused 246 U. S. 675).

—and that a writ of error would lie to the Circuit Court of Appeals from the Commissioner's act, and denied the motion to return property taken because the proceeding:—

" * * * was in the district court by a judicial officer, subordinate, but independent, sitting as a committing magistrate, having equal power with any Judge authorized to hold a District Court."

Judge Hand in *U. S. vs. Casino*, 286 Fed. 976 at 979, after referring to *U. S. vs. Maresca*, *supra*, held that the United States Commissioner, in issuing a search-warrant, acted in a ministerial capacity, and the writ would be improper and at page 981 said:

"It is clear that *certiorari*, assuming that this court has power in a proper case to issue that writ (citing cases) is not necessary, and indeed, if the action of the commissioner be not judicial, the common-law writ, which is all that could go in any event, would be improper."

The writ, if this Court has power to issue it, is not necessary, and in my opinion would be improper. Plaintiff relator has other adequate remedy.

From any viewpoint of approach the petition must be denied.

NETERER,
United States District Judge.

Note: See also *Bates vs. Payne*, 194 U. S. 106; *Marquiz vs. Friabie*, 101 U. S. 473; *In re 1169 Myrtle Ave.*, 288 Fed. 384; *In re Alpern*, 280 Fed. 435; *U. S. vs. Roman*, 253 Fed. 814; *U. S. vs. Berry*, 4 Fed. 779; *The Mary*, 233 Fed. 121 (decision by the writer). [19]

[Endorsed]: Filed in the United States District Court, Western District of Washington. Northern Division. Dec. 11, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

In the United States District Court for the Western District of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon
the Relation of J. L. FINCH,

Relator,

versus

H. S. ELLIOTT, a United States Commissioner
for the Western District of Washington,
Respondent.

ORDER DENYING WRIT OF CERTIORARI.

And now the Court having heretofore on the 11th day of December, 1924, filed herein its written opinion ordering and adjudging that relator's petition for writ of certiorari should be denied,

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the petition of the relator in the above-entitled cause, petitioning the Court for a writ of certiorari to review certain proceedings had before H. S. Elliott, a United States Commissioner for the Western District of Washington, be and the same hereby is denied, to which ruling of the Court the relator excepts and his exceptions are by the Court allowed.

Dated, Dec. 20, 1924.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon
the Relation of J. L. FINCH,
Relator and Appellant,
vs.

H. S. ELLIOTT, a United States Commissioner,
for the Western District of Washington,
Respondent and Appellee.

PETITION FOR APPEAL.

To the Honorable JEREMIAH NETERER, Judge
of the United States District Court for the
Western District of Washington, Northern
Division:

The above-named relator feeling himself ag-
grieved by the order made and entered in this cause
on the 20th day of December, 1924, does hereby ap-
peal from the said order to the United States Cir-
cuit Court of Appeals for the Ninth Circuit, for
the reasons specified in the assignment of errors,
which is filed herewith; and he prays that his ap-
peal be allowed, and that citation issue as provided
by law, and that a transcript of the record, pro-
ceedings and papers upon which said order was
based, duly authenticated, may be sent to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit, sitting at San Francisco in the State of Cali-
fornia.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

J. L. FINCH,

Solicitor *in pro. per.*

Petition for appeal granted, and the appeal allowed, upon giving bond, conditioned as required by law, in the sum of Five Hundred Dollars.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

United States District Court for Western District
of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon
the Relation of J. L. FINCH,

Relator and Appellant,

vs.

H. S. ELLIOTT, a United States Commissioner,
for the Western District of Washington,
Respondent and Appellee.

ASSIGNMENT OF ERRORS.

Now comes, The United States of America, upon
the relation of J. L. Finch, relator and appellant,

in the above-entitled cause, and in connection with his petition for appeal in this cause assigns the following errors, which appellant avers occurred therein, and upon which he relies to reverse the judgment entered herein, as appears of record:

1. The Court erred in denying the petition filed in this cause.

2. The Court erred in not granting a writ of certiorari in this cause.

3. The Court erred in not granting a writ of certiorari, with ancillary orders of supersedeas, in this cause.

4. The Court erred in not granting the relief prayed for in this cause.

5. The Court erred in not granting any relief in conformity with the petition in this cause.

WHEREFORE, appellant prays that the judgment of said Court be reversed, and that mandamus issue requiring the Court to grant relator the relief prayed for in his petition.

J. L. FINCH,
Attorney for Appellant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

United States District Court, Western District of
Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon
the Relation of J. L. FINCH,

Relator and Appellant,

versus.

H. S. ELLIOTT, a United States Commissioner,
for the Western District of Washington,
Respondent and Appellee.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS,
that we, J. L. Finch, as principal, and the National
Surety Company, a corporation legally organized
under the laws of the State of New York and duly
authorized to transact a general surety business in
the State of Washington, as surety, acknowledge
ourselves to be jointly indebted to H. S. Elliott, a
United States Commissioner for the Western Dis-
trict of Washington, appellee in the above cause
in the sum of \$500.00; conditioned that, whereas,
on the 20th day of December, 1924, in the District
Court of the United States for the Western District
of Washington, Northern Division, in a suit pend-
ing in that court, wherein the United States of
America on the relation of J. L. Finch was relator
and H. S. Elliott, a United States Commissioner
for the Western District of Washington, was re-
spondent, numbered on the equity docket as No.

9006, an order was rendered against the said United States of America upon the relation of J. L. Finch, and the said United States of America upon the relation of J. L. Finch having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said order and a citation directed to the said H. S. Elliott, a United States Commissioner for the Western District of Washington, and to Thomas P. Revelle, United States Attorney for the Western District of Washington, citing and admonishing them, and each of them, to be and appear at a session [24] of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, in the State of California, within thirty (30) days from the date of said citation.

NOW, if the said United States of America, upon the relation of J. L. Finch, shall prosecute said appeal to effect and answer all costs if it fails to make its plea good, then the above obligation to be void otherwise to remain in full force and effect.

[Seal]

J. L. FINCH,

Principal.

NATIONAL SURETY COMPANY.

By _____.

Resident Vice-President.

[Seal]

Attest: _____,

Resident Asst. Secretary.

NATIONAL SURETY COMPANY,

By W. L. ATKINSON,

Attorney-in-Fact.

Approved: Dec. 20, 1924.

NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [25]

In the United States District Court for the Western District of Washington, Northern Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon
the Relation of J. L. FINCH,
Relator and Appellant,
vs.

H. S. ELLIOTT, a United States Commissioner,
for the Western District of Washington,
Respondent and Appellee.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please make a transcript of the record on appeal to the United States Circuit Court of Appeals of the Ninth Circuit in the above-entitled cause and include therein the following:

1. Amended petition for writ of certiorari and for ancillary relief.
2. Appearance of the United States Attorney, if any.

3. Decision of the Court.
4. Order denying writ.
5. Petition for appeal and order allowing same.
6. Assignment of errors.
7. Bond.
8. Citation.
9. This praecipe.

J. L. FINCH,
Attorney for Appellant.

Service acknowledged, Dec. 20, 1924.

C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed:] Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch. [26]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 9006.

THE UNITED STATES OF AMERICA, upon
the Relation of J. L. FINCH,

Relator,

vs.

H. S. ELLIOTT, a United States Commissioner,
for the Western District of Washington,
Respondent.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 26, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [27]

Clerk's fees (Sec. 828 R. S. U. S.) for making	
record, certificate or return, 60 folios at 15¢	\$9.00
Certificate of Clerk to transcript of record, 4	
folios at 15¢.....	60
Seal to said Certificate.	20

I hereby certify that the above cost for preparing and certifying record, amounting to \$9.80 has been paid to me by attorney for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set *my and* affixed the seal of said Court, in said District, this 22d day of December, 1924.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the
Western District of Washington. [28]

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 9006.

THE UNITED STATES OF AMERICA, upon
the Relation of J. L. FINCH,
Relator and Appellant,
vs.

H. S. ELLIOTT, a United States Commissioner,
for the Western District of Washington,
Respondent and Appellee.

CITATION.

United States of America,—ss.

The President of the United States of America,
to H. S. Elliott, a United States Commissioner
for the Western District of Washington, and

to Thomas P. Revelle, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby notified that in a certain case in equity in the United States District Court for the Western District of Washington, Northern Division, wherein the United States of America upon the relation of J. L. Finch is relator and H. S. Elliott, a United States Commissioner for the Western District of Washington, is respondent, an appeal has been allowed the relator therein to the United States Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be and appear in said court at San Francisco, in the State of California, within thirty (30) days after the date of this citation to show cause, if any there *by*, why the order and decree appealed from should not be corrected, and speedy justice done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division, this 20th day of December, 1924.

JEREMIAH NETERER,
United States Dist. Judge.

[Seal] Attest: F. M. HARSHBERGER,
Clerk of the Dist. Court of the United States for
the Western Dist. of Wash., Northern Division.

Service of the above citation acknowledged this 20th day of December, 1924.

H. S. ELLIOTT,
United States Commissioner Western Dist. of
Washington.

THOMAS P. REVELLE,
United States Attorney for the Western Dist. of
Washington. [30]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 4446. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, upon the Relation of J. L. Finch, Appellant, vs. H. S. Elliott, a United States Commissioner for the Western District of Washington, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 26, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.